SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 368

GEMSCO, INC., ET AL.,

Petitioners,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR

No. 369

MILDRED MARETZO, ET AL.,

Petitioners,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR

No. 370

JOSEPHINE GUISEPPI, ET AL.,

Petitioners,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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Opinions of the Court Below

The opinions of the Circuit Court of Appeals for the Second Circuit are reported in 144 F. (2d) 608 and are printed R. 189-246.

Jurisdiction

The orders and decrees of the Circuit Court of Appeals were entered July 27, 1944 (R. 224-226). The joint petition for writs of certiorari was filed August 18, 1944, and was granted October 16, 1944. The jurisdiction of this court rests on Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347 (a)), and on Sec. 10 (a) of the Fair Labor Standards Act of 1928 (29 U. S. C. A. Sec. 210 (a)).

Question Presented

Is the Administrator empowered by Section 8 (f) of the Fair Labor Standards Act of 1938 to prohibit the performance of home work by including the prohibition as a "term and condition" of a wage order which establishes a minimum wage rate?

Statute Involved

The statute directly involved is Section 8 (f) of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. A. Sec. 208(f)).

The relevant provision is:

> "(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein."

Statement

A. Facts

The petitioners Gemsco, Inc., et al., Mildred Maretzo, et al., and Josephine Guiseppi, et al., comprise both home

workers and employers in the embroideries industry (R. 2, 8, 23). This industry produces primarily for manufacturers of apparel and apparel accessories (R. 76).

Home work in the various branches of the industry (R. 37, 76) is distributed directly to home workers by regular embroidery manufacturers and contractors (R. 80-81).[1] These concerns supply the workers with materials, designs, cloth, etc. (R. 86).

Approximately forty per cent of the employers engaged in the industry depend exclusively upon home workers (R. 132). There are between 8,500 and 12,000 home workers constituting approximately one-third of all the employees in the embroideries industry (R. 79); but about two-thirds of the embroiderers in the military and naval insignia branch of the industry are home workers (R. 157, 158), and most of them earn at least 68 cents per hour (R. 159). There was evidence that the earnings of many home workers in certain other branches of the industry also exceeded the minimum wage rate (R. 105) as well as that piece rates for certain operations in the industry are high enough to yield the minimum (R. 104, 107).

The reasons stated by home workers for their preference for home work over factory work were included in the record. They are the necessity of caring for children and aged parents, household duties, ill health, age, distance of residence from factory, etc. (R. 141, 143, 158); but the Administrator would not accept their testimony that they would not work in factories as furnishing a sound basis for predicating their actual conduct when faced with actual

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[1] The facts stated under this heading include those which were found by the Administrator (R. 38-155) and which appeared in evidence and were uncontradicted. Bearing in mind the limited nature of the question presented, no attempt is made to summarize the 1,691 pages of the transcript of the hearings and the voluminous exhibits and reports (R. 40). In view of the limited nature of judicial review of administrative proceedings, the findings of the Administrator were not, and are not now, disputed.

prohibition of home work (R. 143-144). He found that the effect of abolishing home work would result in increased productivity by fewer factory workers doing the same work as the home workers (R. 143, 150-151) and concluded that the abolition of home work would result in "no substantial curtailment of operation." (R. 153)[2]

The Administrator included the prohibition of home work in the wage order solely because he found that he could not enforce the minimum wage rate as to home workers employed in the industry, largely because of the very nature of home work (R. 107, 108, 114, 130).[3] The difficulty of attaining effective enforcement of the minimum wage rate is not an exclusive characteristic of industries employing home workers. The Annual Report of the Administrator of the Wage and Hour Division for the fiscal year ending June 30, 1943, at page 34, states that of 42,056 establishments inspected in 1943 in approximately sixty industries, 65% were found to be in violation of the Act. His Annual Report for the fiscal year ending June 30, 1941, at page 106, indicated that 71% of the establishments inspected were in violation of the Act. These inspections did not involve home work establishments and were made as a routine departmental procedure not based on complaints.

B. Administrative Proceedings

On June 6, 1942, the Administrator, pursuant to Sections 5 and 8 of the Fair Labor Standards Act of 1938, appointed an Industry Committee for the embroideries industry to

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[2] N.B. The phrase used in Sec. 8 (a) (b) (c) and (e) and inferentially in (d) as the guide for administrative action is "without substantially curtailing *employment*". An inspector of the Wage and Hour division, testifying for the Administrator, said that in the case of nine embroidery firms which discontinued home work "*156 employees were performing operations formerly done by 241 home workers*" (R. 143).

[3] The Administrator found that industrial home work as an economic and social problem was neither new nor confined to the embroideries industry (R. 75).

recommend minimum wage rates for all employees of that industry subject to the Act. The Industry Committee, after investigation, filed its report with the Administrator recommending a minimum wage rate of 40 cents an hour (R. 38). The Industry Committee made no recommednation as to the prohibition of home work, nor did it consider the question.

In November 1942, public hearings were held by the Administrator (R. 39-40), and on August 21, 1943 the Administrator issued his findings and opinion (R. 38-155) and the wage order now under review (R. 34-37). The wage order (1) approves the Industry Committee's recommendation of the 40 cent minimum hourly wage rate, and (2) in addition prohibits, with limited exceptions,[4] the employment of home workers in the said industry (R. 35-36). The petitioners, during the entire course of the proceedings, endorsed the Industry Committee's recommendation of a 40 cent per hour minimum wage rate and challenged only the statutory authority of the Administrator to include in the wage order the provision relating to the prohibition of home work (R. 40).

The Administrator, in his "Findings and Opinion," concluded that labor conditions in industrial home work are not susceptible to regulation (R. 110), because of the difficulty of home work inspection (R. 116-117), because the conditions under which home work is performed are largely outside the control of employers (R. 116), and because piece rates cannot be fixed to yield the minimum wage (R. 89-90, 130). He found substantial violation of record keeping and minimum wage provisions in the industry (R. 113, 106-107). In addition, he found that adjustment to factory work could be made without undue hardship upon most home workers and home work employers (R. 137).

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[4] The Administrator stated "relatively few home workers will be eligible to continue home work under this exception" (R. 153).

After the Administrator issued his findings and made the order herein, the petitioners filed petitions in the Circuit Court of Appeals for the Second Circuit seeking a review of the order and to have it set aside (R. 1-32). On the 27th day of June, 1944, the Circuit Court handed down its opinion affirming the order (R. 189-224).[5] On the 27th day of July, 1944, the orders and decrees herein were entered in accordance with the opinion.

Assignment of Errors

The Circuit Court of Appeals erred:

(1) In entering its orders and decrees affirming in all respects the wage order of the Administrator, which prohibited, with limited exceptions, the performance of home work in the embroideries industry.

(2) In ruling that Section 8 (f) of the Fair Labor Standards Act of 1938 empowered the Administrator to prohibit industrial home work in the embroideries industry as a "term and condition" of a wage order.

Summary of Argument

I

The narrow question presented is whether the provision of the Administrator's order which prohibits home work is an authorized "term and condition" of a wage order within the meaning of Sec. 8 (f) of the Fair Labor Standards Act. Our conclusion, that the power to prohibit home work as one method of enforcing the minimum wage established by his order was withheld from the Administrator, must be reached whether we seek the answer to the question by considering the broad purposes of the statute, the mis-

[5] Three separate opinions were rendered by the Court below. Frank, J. and L. Hand, J., for different reasons, upheld the Administrator's order (R. 189-219; 219-221), and Swan, J., dissented (R. 221-224).

chief which gave rise to it, and the remedy prescribed therefor (cf. Max Radin, A Short Way With Statutes, 56 Harv. L. R. 388), or whether we approach the task of discovering the meaning of the statute by employing the materials pertinent to construction to which resort has always been had by the Courts in ascertaining the meaning and scope of legislation (cf. James M. Landis, A Note on Statutory Interpretation, 43 Harv. L. R. 886; Richard R. Powell, The Construction of Written Instruments, 14 Indiana L. J. 199, 309, 324).

While the broad aim of the Fair Labor Standards Act and related progressive legislation is to present a solution to the problem of unemployment by increasing wages and the earning power of workers generally, nevertheless the immediate aim of the Fair Labor Standards Act is to regulate wages and hours directly without dealing with all the factors, such as home work, indirectly involved in the maintenance of wage rates. The weapons furnished by Congress for the arsenal of enforcement of wage and hour provisions are criminal prosecution, injunction and civil liability.

The legislative design to limit the scope of the Act to the fixing of minimum wage rates and maximum hours and regulating child labor was clearly expressed by the sponsor of the measure in the committee reports and in Congress; it was also clearly indicated when the conference which reported the measure as finally enacted deliberately deleted a Senate amendment to the Bill which would have in express terms given to the Administrator the power to prohibit home work as a "term and condition" of a wage order. This deletion was made notwithstanding the fact that the Secretary of Labor had requested the inclusion of a provision giving the Administrator this power in express terms. The limitation of the scope of the Act was clearly expressed by the entire course of the legislation in Congress.

The function of the legislative branch of Government to enact experimental social legislation is now clearly recognized; but to disregard the limitations placed by Congress on the extent of the experiment is conducive neither to a responsible exercise of the legislative function nor to proper cooperation between the legislative and administrative branches of Government.[6]

The Administrator asserts his authority to prohibit home work by virtue of Sec. 8 (f) (R. 67). The deliberate deletion (from Section 9 (6) of the bill S.2475 from which Sec. 8 (f) was derived) of the parenthetical clause "(including the restriction or prohibition of industrial home work or of such other acts or practices)" after the words "terms and conditions" is, under well established judicial decisions, persuasive evidence of legislative purpose to exclude from the meaning of the general words "terms and conditions" a provision prohibiting home work. No sound explanation for the elimination of the phrase other than the Congressional plan to withhold such power from the Administrator having been advanced, such evidence, in the light of all the circumstances, is conclusive as to the legislative purpose.

II.

The Administrator, to whom Congress gave no general rule making power notwithstanding the request therefor of the Administrator and Representative Norton subsequent to the passage of the Act, is expressly limited by the terms of Section 8 (f) to including "terms and conditions" only in "Orders issued under this section". As to wage

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[6] Sec. 4(d) of the Act provides: "The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable."

rates established automatically by Section 6 of the Act[7] the Administrator clearly does not have the power to prohibit home work for there are no general words anywhere in the statute under the cover of which he might claim such power. To read Section 8 (f) as including the power to prohibit home work would be "nothing short of absurd"; for he then would have the power to prohibit home work in those industries where the minimum wage rate is established by wage order although he clearly cannot prohibit home work in those industries where the minimum wage rate rate is automatically established by Section 6. Furthermore, in accordance with Section 8 (e) all wage orders of the Administrator will expire on October 23, 1945. To use the language of L. Hand, J., in the concurring opinion below, it is "nothing short of absurd" to ascribe to Congress the purpose of authorizing as a temporary measure "so heroic a remedy" as is imposed by "the proscription of a substantial part of the industry" and which "will disorganize and make over the industry, break up much family economy and produce conditions which cannot possibly adjust themselves until after it has itself ceased to exist" (R. 220).

Furthermore, we may not ascribe to Congress the anomalous purpose of giving the Administrator the power to promulgate, pursuant to Sec. 8 (f), an order prohibiting home work without giving him some power to enforce such order; and yet the enforcement provisions of the Act, Sections 15, 16 and 17, afford the Administrator no method of enforcement of such prohibition by criminal prosecution, injunction or otherwise. The particularity with which the prohibited acts and penalties are described in the enforce-

[7] This section, establishing fixed wage rates, was the chief contribution of the bill passed by the House of Representatives to the final measure approved by the Conference Committee. The House bill had no provision for administrative orders.

ment provisions of the Act precludes any addition by implication to the catalogue of enforcement measures therein listed. It is obvious, that if Section 8 (f) meant that the Administrator had authority to include a provision prohibiting home work in his wage order, the statute, in express language, would have accoutred the Administrator with some implement of enforcement.

ARGUMENT

I. The Fair Labor Standards Act of 1938 Did Not, Expressly or Impliedly, Authorize the Administrator to Include in a Wage Order a Provision Which Prohibits Home Work.

The Administrator asserts the power to prohibit home work as a "term and condition" of a wage order by virtue of Sec. 8 (f) of the Act (R. 67). The words "terms and conditions" as used in Section 8 (f) are not words of art, so crystal clear as to what they embrace that their broadest possible meaning must be accepted without a consideration of the circumstances of their employment.[8] Mr. Justice Murphy in *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479, said "But words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination'. *U. S.* v. *American Trucking Assns.*, 310 U. S. 534, 543-544. See also *U. S.* v. *Dickerson*, 310 U. S. 554-562". It is therefore apparent that the broad, general language of Sec. 8 (f) is capable of a clear meaning only when read in the light of the circumstances of its employment. (cf. Holmes, J. in *Popovici* v. *Agler*, 280 U. S. 369; Richard R. Powell, 14

[8] The Administrator, in his "Findings and Opinion", stated that he made a careful study of the legislative history of Section 8 (f) and he conceded that the ultimate question of his authority was for the Court (R. 67).

Indiana L. J. 199, at p. 231). We therefore direct our attention to the legislative history of the Act in order to determine whether the phrase "terms and conditions" as used in Sec. 8 (f) includes within its meaning a provision which prohibits home work.

Legislative History of the Fair Labor Standards Act of 1938

On May 24, 1937 the President sent his message to Congress urging it to enact legislation "to reduce the lag in the purchasing power of industrial workers", to put an end "to the existence of child labor" and to exercise control of wages and hours "without creating economic dislocation." (Report No. 1452, H. R., 75th Cong. First Sess. pp. 6-7).

On the same day Senator Black introduced S. 2475 in the Senate (81 Cong. Rec. 4954) and Representative Connery introduced H. R. 7200 in the House of Representatives (81 Cong. Rec. 4998). Joint public hearings were held by the Senate and House committees to which the respective bills were referred (Joint Hearings, 75th Congress, First Session on S. 2475 and H. R. 7200). On July 6th, S. 2475 was reported by the Committee to the Senate (81 Cong. Rec. 6894).

The Committee's report on this Bill (Senate Report No. 884, 75th Cong. First Sess.) was submitted to the Senate by Senator Black. The report states, at pages 4-5: "Practical statesmanship suggests the wisdom of a cautions legislative approach to the progressive realization of these social and economic objectives. The committee has accordingly restricted the bill to the establishment of minimum wages not in excess of 40 cents per hour and maximum hours not shorter than 40 hours a week and the prohibition of industrial child labor * * *. The committee has diligently endeavored to write in the law itself, the rules and

legal prohibitions intended to accomplish the desired objectives * * *."

On July 27, 1937, Senator Black having been asked on the floor of the Senate if the bill had anything to do with the regulation of prison labor, stated: "the committee reached the conclusion that it would be unwise and improper to attempt to deal in this bill with anything except minimum wages, maximum hours and child labor" (81 Cong. Rec. 7658). He again stated that the Committee decided "that we would limit the bill strictly to minimum wages, maximum hours, and child labor and that is what we have done" (81 Cong. Rec. p. 7659).[9]

The Senate Bill contained no provision for the prohibition of home work, notwithstanding the fact that on June 4, 1937 the Secretary of Labor appeared at the Joint Hearings and stated that power should be given to the administrative authority to "prohibit entirely the use of industrial home work" (Printed Testimony of the Joint Hearings, pp. 184, 190, 196, 197). She also indicated that the powers of the Board ought to be carefully defined by Congress so that the Act itself would clearly state the powers which the Board had (Joint Hearings, p. 195). In a colloquy between Secretary Perkins and Representative Thomas, Secretary Perkins stated that the Act should be written so as to specifically give the administrative authority the power to prohibit home work, but Representative Thomas interposed the objection that that would place a

[9] This purpose of limiting the statute to the establishment of minimum wages, maximum hours and the prohibition of child labor, is not obscured by the fact that the Act was to be known as "The Fair Labor Standards Act". Sec. 2 (11) of S. 2475, as reported by the Joint House and Senate Committee, defines "Fair Labor Standards" as meaning "a condition of employment under which (A) no employee is employed at an oppressive wage; or (B) no employee is employed for an oppressive work week." Subsections (8) and (9) of Section 2 define "oppressive wage" as a wage lower than the applicable minimum wage declared by the order of the Board and "oppressive work week" as a work week longer than the applicable maximum work week declared by order of the Board.

superhuman tax upon the administrative agency (Joint Hearings, p. 190.[10] Mention of industrial home work was also made at pages 402, 408, 409 and 432 of the Printed Minutes of the Joint Hearings.

The bill was debated in the Senate for a period of about a week (81 Cong. Rec. 7596-7957, passim). Section 9 (6), relating to wage orders, provided that such an order shall contain such terms and conditions as the Board finds necessary to carry out the purposes of such order, to prevent the circumvention or evasion thereof, or to safeguard the fair labor standards therein established. On the floor of the Senate, on July 30, 1937, one day prior to the passage of the bill, Senator Murray proposed an amendment to Section 9 (6) adding the words "including the restriction or prohibition of industrial home work". He said "it seems to me that such a provision should be made in this bill". The amendment was agreed to without debate or a record vote (81 Cong. Rec. 7891). In fact, during all the debates in the Senate from July 26th to July 31st, 1937 there was no opposition to the bill comparable to that shown in the House. The bill passed the Senate on July 31, 1937 (81 Cong. Rec. 7957).

The bill S. 2475 limited the Labor Board's jurisdiction to fixing wages not in excess of 40 cents per hour and maximum hours not less than 40. Section 11 provided for advisory committees. The provisions of sections 14 (a) and 14 (b) requiring the posting of schedules of the hours of work of each employee and authorizing the Board to

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[10] "The Act extends to thousands upon thousands of persons and businesses. It is estimated that the Act covers 15,500,000 persons employed by more than 360,000 employers in 48 states, the District of Columbia, Hawaii, Porto Rico and the Virgin Islands." Mr. Justice Douglas, dissenting in *Cudahy Packing Co.* v. *Holland* (1942), 315 U. S. 357, at page 368. The Administrator's Annual Report for the fiscal year ending January 30, 1941, at page 106, indicates 71% non-compliance with the Act and the report for the year 1943 at page 34 indicates 65% non-compliance, in industries in general.

require that goods be labeled were ultimately stricken from the Act.

No action was taken by the House Committee on H. R. 7200, which committee "in order to expedite the passage of the bill" considered only S. 2475 (which had been referred to it on August 2, 1937. 81 Cong. Rec. 8063) and reported it favorably with amendments to the Committee of the whole House on the State of the Union. (82 Cong. Rec. 1386; H. Report No. 1452, 75th Cong. First Sess.; 81 Cong. Rec. 8478).

On December 13, 1937, the House resolving itself into a Committee of the Whole House on the State of the Union, began consideration of S. 2475 (82 Cong. Rec. 1385, 1389, 1390, 1463-1834, *passim*). The full force of opposition to giving the Board wide discretionary powers was displayed in the debates on the floor of the House.

On December 15, 1937, Repesentative Mary Norton, Chairman of the House Committee on Labor, who was a House manager on the final Conference Committee, and who, on the death of Representative William Connery, became the sponsor of the bill in the House, presented a substitute bill following in most details the original S. 2475, but setting up an Administrator instead of a Board. Section 9 (6), relating to wage orders, contained the same provision as to the prohibition of home work as the bill that passed the Senate (82 Cong. Rec. 1511-1516 at p. 1514; 1572-1577 at p. 1575; 1580-1585 at p. 1583).

On December 17, 1937, S. 2475 was ordered printed, showing the bill as amended and agreed to in the Committee of the Whole House on the State of the Union and recommitted to the Committee on Labor. The provision relating to the posting of schedules and the provision as to the requirement of labels contained in Section 14 (a) and 14 (b) of S. 2475 was stricken out in this draft. With respect to the provision relating to the posting of schedules, Congressman

Ramspeck of the House Labor Committee, who was later a House manager of the Final Conference Committee, had said he would move to amend S. 2475 by striking out the provisions relating to the posting of schedules of the time each employee went to work and quit work. He had said "I say it is absolutely absurd to put business under any such regulation as that."[11] Mrs. Norton then said that the Committee did not oppose such amendment (82 Cong. Rec. 1821). House Report No. 1452, 75th Congress, First Session, Union Calendar No. 535 dated August 6th, 1937, at p. 18, refers to the Committee amendment proposing to strike out the provision authorizing the Board to direct that goods subject to the Act be labeled.

The House print of S. 2475, dated December 17, 1937, authorized the Administrator to enjoin any violation not only of any provision of the act, but also of any provision of any labor standard order (Section 13, amended to read Section 12). Section 16 (amended to read Section 15) gave the Administrator general rule-making powers.

On April 21, 1938, the passage of S. 2475 having been blocked in the House by the objections to the discretionary powers which it granted to the administrative agency, an entirely new measure was reported establishing fixed minimum wages and maximum hours, and giving the Secretary of Labor only the power to declare that a particular industry was "an industry affecting commerce" and therefore subject to the Act. It contained no provision for administrative orders. It also contained Child Labor provisions (H. Report No. 2182, 75th Cong., 3rd Sess., Union Calendar No. 805).

On May 23 and May 24, 1938, the debates continued in the House, and were directed mainly to substitute bills patterned after the original S. 2475. On May 24, 1938, Repre-

[11] The Administrator had stated that provisions covering these subjects were stricken without comment (Memorandum for respondent on Petition for Writs of Certiorari, p. 14).

sentative Ramspeck introduced a substitute bill, Section 8 (6) thereof, relating to wage orders, having the same provisions with respect to home work as were contained in the Norton substitute and in the original S. 2475 as it passed the Senate. The Ramspeck substitute was rejected in the House by a record vote, having been previously rejected by the Labor Committee (83 Cong. Rec. 7389, 7373—1st paragraph, Second Column 7378). This bill was substantially the same as the original Senate bill (83 Cong. Rec. 7378). Representative Ramspeck explained that the posting-of-schedule provision had been taken out of substitute. "These things just simply interfere with business and are not necessary to a proper functioning of the law" (83 Cong. Rec. 7378).

On May 24, 1938, the newly reported House bill was passed (83 Cong. Rec. 7449-7450). Conferees were appointed in the Senate and in the House (83 Cong. Rec. 7560, 7770). Senator Murray, Representatives Norton and Ramspeck were amongst the conferees. The conferees met on June 2, 1938 (83 Cong. Rec. 8028) and on June 14, 1938 the Conference Report was read in the House (83 Cong. Rec. 9246-9255). Representative Norton stated "The Conference Committee met every day for 12 days and the bill was written around the conference table" (83 Cong. Rec. 9256). The Conference Report contained an analysis of the provisions of the Senate bill and the House bill and indicated that substantial portions of both bills were transferred to the final conference bill, which incorporated the fixed wage scheme of the House bill together with the flexible wage scheme of the Senate bill. It is apparent from an examination of the report, and from a comparison of the language of the two bills from which the final measure was derived with the language of the final enactment, that S. 2475 which was before the Conference Committee, had been examined word by word, sentence by sentence, and paragraph by paragraph. In drafting Section 8 (f) which was compara-

ble to Section 9 (6) of the Senate bill, the conferees deliberately rejected the parenthetical clause "(including the restriction or prohibition of industrial home work or of such other acts or practices)," which followed the words "terms and conditions." The Conference Report was signed in the House on June 14, 1938 (83 Cong. Rec. 9345) and in the Senate on June 15 (83 Cong. Rec. 9348) and the bill was signed by the President on June 16, 1938 (83 Cong. Rec. 9616). In the final discussions of the conference bill, the limited nature of the Administrator's discretion with respect to fixing wage rates was pointed out in the House and Senate (83 Cong. Rec. 9263; 9164, 9177).

Subsequent to its passage, Representative Norton at the suggestion of the Administrator (See First Annual Report of the Administrator of the Wage and Hour Division, U. S. Dept. of Labor for the Calendar Year 1939, at p. 16) proposed H. R. 5435 to the 76th Congress. Referring to the Administrator's lack of power to make rules and regulations, Representative Norton said on March 29, 1939, "I believe that he further needs * * * the power to make special provisions with respect to industrial home work" (84 Cong. Rec. 3498). H. R. 5435 would have given the Administrator that power. On April 26, 1940, still pressing for an amendment, Mrs. Norton said "This section will also give him the right to * * * make special provisions with respect to industrial home work." 86 Cong. Rec. 5122.

Section 4 (a) of H. R. 5435 (86 Cong. Rec. 5193 if enacted, would have given the administrator the authority to make regulations and "without limiting the generality of the foregoing" to make special provision "with respect to, including the restriction of, homework to the extent necessary to safeguard the minimum wage standards provided by the statute".

Bulletin No. 26 of the U. S. Department of Labor, Division of Labor Standards, entitled, "Industrial Homework Legislation and Its Administration", published in 1939, after

the enactment of the Fair Labor Standards Act, stated at pages 7 and 8 thereof, that legislation by the Federal Congress had been urged that anticipates the abolition of the home work system and pointed out that the Act contains no proscription as to the place where the employee shall work. The bulletin states, at page 10, with respect to industrial homework "the matter of effective administrative techniques is still in a formative period."

In a document entitled "Suggested Language for a State Wage and Hour Bill (Adapted for State Use from 'Fair Labor Standards Act of 1938')" prepared by a Committee appointed by the Secretary of Labor in response to a suggestion to supplement federal legislation by state action, a specific provision is made authorizing the State Industrial Commissioners to make orders which "may include such terms and conditions including the restriction or prohibition of industrial home work", as the Commissioner finds necessary to carry out the purposes of the Act "or of a wage order issued thereunder, and to prevent the circumventions or evasion thereof and to safeguard the standards therein established * * *." (Commerce Clearing House, Labor Law Service, Vol. 2A, page 40101 et seq.)

A. THE LEGISLATIVE HISTORY OF THE FAIR LABOR STANDARDS ACT SHOWS THAT THE PROHIBITION OF HOME WORK AS A METHOD OF ENFORCING THE MINIMUM WAGE RATE WAS EXCLUDED FROM THE LEGISLATIVE DESIGN EMBODIED IN THE ACT.

The language of Section 8(f) of the Fair Labor Standards Act of 1938 follows the language of Section 9(6) of S. 2475 so closely as to produce the conviction that the Conference Committee draftsmen had Section 9(6) before them, and, considering it word by word, deliberately excluded the reference to home work, cf. *Western Vegetable Oils Co.* v. *Southern Cotton Oil Co.*, (CCA 9-1944) 141 F.

2nd, 235, 237. The significance of the omission of the parenthetical clause relating to home work lies in the fact that "successive drafts of the same act do not simply succeed each other as isolated phenomena, but the substitution of one for another necessarily involves an element of choice often leaving little doubt as to the reasons governing such choice." (James J. Landis, 43 Harv. L. R., 886, 889). The omission by the conference bill bespeaks the legislative purposes and design as eloquently as would a direct statement in the report.

In the following parallel columns the provisions of Section 8(f) of the Fair Labor Standards Act of 1938 are set forth with the comparable provision of the Senate Bill, S. 2475, which was rejected by the Conference Committee.

Enacted	**Rejected**
Section 8 (f) of the Fair Labor Standards Act of 1938 provides as follows:	Section 9(6) of S. 2475 provided as follows:
"Orders issued under this section shall define the industries and classifications therein to which they are to apply, and	"A labor-standard order * * *
shall contain such terms and conditions	(6) shall contain such terms and conditions **(including the restriction or prohibition of industrial homework or of such other acts or practices)**
as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein."	as the Board finds necessary to carry out the purposes of such order, to prevent the circumvention or evasion thereof, or to safeguard the fair labor standards therein established."

In the light of the foregoing legislative history, the action of the Conference Committee in deliberately excluding from Section 8(f) the provision relating to the prohibition of home work is conclusive that, within the meaning of Section 8(f), the words "terms and conditions" do not include a grant to the Administrator of the authority to prohibit home work which would have been given to him by the omitted clause. *Lapina* v. *Williams*, 232 U. S. 78, 89-90; *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 362 (f. n. 3), 366, *Pa. R. R. Co.* v. *Internat'l Coal Mining Co.*, 230 U. S. 184, 198; *Maurer* v. *Hamilton*, 309 U. S. 598, 613; *McLeod* v. *Threlkeld*, 319 U. S. 491, 394; *Boston Sand and Gravel Company* v. *U. S.* 278 U. S. 41, 47-48; *J. W. Ould Co.* v. *Davis*, (CCA 4) 246 F. 228); *Keystone Mining Co.* v. *Gray*, (CCA 3) 120 F. 2nd 1, 9-10); *U. S.* v. *Delaware and Hudson Co.*, 213 U. S. 366, 414; *U. S.* v. *United Shoe Machinery Co.*, 264 F. 138, 174-175, aff'd. 258 U. S. 451; *Carey* v. *Donohue*, 240 U. S. 430, 436-437; *Fleming* v. *Hawkeye Pearl Button Co.*, (CCA 8) 118 F. 2nd 52, 58; *Boyd* v. *Thayer*, 143 U. S. 135, 167-168; *MacDonald* v. *Southern Express*, 134 F. 282, 288.

The Administrator has argued that the cases above cited are not in point since "the House never specifically rejected the parenthetical clause referring to home work." Many of the cases cited, however, included rejection and exclusion of amendments by Conference Committees (See *Lapina* v. *Williams*, *Cudahy Packing Co.* v. *Holland*, *Penn. R. R.* v. *International Coal Mining Co.*, and *Keystone Mining* v. *Gray*, supra), as well as the rejection of amendments by a vote on the floor.

The omission of the parenthetical clause may not be attributed merely to style or draftsmanship. Parenthetical clauses introduced by the word "including" are found in other portions of the Act, e. g. Sec. 3(f) and Sec. 3(i). Furthermore, the Labor Department had expressly requested

the inclusion of a specific provision to authorize the prohibition of home work, and the Department of Labor's carefully drafted model state uniform wage and hour bill specifically included a provision permitting the administrative authority to prohibit home work as a term and condition of a wage order (supra, p. 18).

Judge Hand, in his concurring opinion below, indicated that the omission of the clause relating to home work might be attributed to a desire to prevent the specification within the parenthesis from being taken as exhaustive (R. 221). The parenthetical phrase "including the restriction and prohibition of industrial home work" contained in the rejected amendment to S. 2475, if it had been left in the Act, would not have limited the generality of the powers previously conferred, under the decisions of this Court in *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 1774, 189, and in *Federal Land Bank of St. Paul* v. *Bismarck*, 314 U. S. 95, 100. In the latter case, Mr. Justice Murphy said: "The term 'including' is not one of all embracing definition, but connotes simply an illustrative application of the general principle." Consequently, the suggestion made by Judge Hand in the Court below that the phrase was omitted "lest the specification be taken as exhaustive" must necessarily fail. The expedient of using the commonly employed phrase "without limiting the generality of the foregoing" was also available to an overcautious draftsman.

The Fair Labor Standards Act of 1938 was a compromise between the Senate and House bills, but the significance of that fact is the resulting restriction on the wide discretionary powers given to the administrative agency by the Senate bill. The Act itself, the Committee reports, the statement of its proponents and sponsors and the whole record of Congressional action on the bill indicate that the legislation was an experiment limited in scope and was intended to deal only with precise subjects, namely wages,

hours and child labor. Since S. 2475 had specifically defined "substandard labor condition" as employment in violation of wage and hour standards (Sec. 2(a) (10), (11), (8), (9)), the Congressional findings and declaration of policy embodied in Section 2(a) of the present enactment exhibit no intent to deal with any matter other than substandard conditions in industry resulting from wage and hour practices, or from the employment of child labor, which is expressly mentioned in the Act.

In such a setting the words "terms and conditions" of Sec. 8(f) do not include provisions to prohibit the practice of home work. The Administrator's argument that the prohibition of home work is merely incidental to a wage order and is therefore permissible, since it is not a regulation of home work as an independent subject, disregards not only the limited nature and scope of the experiment which Congress authorized, but also the fact that the very purpose of excluding the parenthetical clause which modified the words "terms and conditions" was to withhold from the Administrator the power to prohibit home work by making a "term and condition" incidental to a wage order.

B. A CONSIDERATION OF VARIOUS PROVISIONS OF THE FAIR LABOR STANDARDS ACT EXCLUDES THE PROHIBITION OF HOME WORK FROM THE MEANING OF THE WORDS "TERMS AND CONDITIONS" AS USED IN SECTION 8(f).

1. The statutory minimum wage rates ("statutory wages") fixed by Section 6 of the Act become operative without the issuance of a wage order. The Administrator cannot prohibit home work as to "statutory wages" since there is no wage order to which he might attach "terms and conditions". Section 8(f) expressly limits the Administrator's power to make "terms and conditions" to "Orders issued under this section." To interpret the words "terms and conditions" in Section 8(f) as includ-

ing the power to prohibit home work would therefore lead to the unfair and untenable conclusion that the Administrator has power to prohibit home work in those industries where the minimum wage rate is established by wage order, although he clearly may not prohibit home work in those industries where the minimum wage rate is automatically established by Section 6.

Furthermore, in accordance with Section 8(e), the Administrator's wage order prohibiting home work will expire on October 23, 1945. It would, therefore, be absurd to assume that Congress intended that the Administrator could make so disruptive but temporary a regulation as the prohibition of home work would entail (R. 219-220). The Administrator's argument that once home work is abolished it will not be resumed is contrary to his own findings (R. 110-111).

Judge L. Hand frankly admitted that unless Congress gave the Administrator power to prohibit home work with respect to "statutory wages", it would be absurd to conclude that Congress gave him such power as to "committee wages" (R. 219-220). He stated that he would disregard the explicit language of Section 8(f) which confines the Administrator's power to make terms and conditions to "Orders issued under this Section", and would hold it applicable to Section 6.

Although general language of a statute need not be given its broadest possible meaning, the disregard of specific language is not justified. As Judge Frank said, in *Queensboro Farm Products* v. *Wickard*, 137 F. 2nd 969, 980. "The Secretary cannot, of course, deviate from the requirements of the statute merely to avoid difficulties of administration or to facilitate enforcement of the Act (cf. *Lynch* v. *Tilden Produce Co.*, 265 U. S. 315, 44 S. Ct. 488, 68 L. Ed. 1034)." And Judge L. Hand, dissenting from the holding in the *Queensboro* case, said at p. 983, that under the guise of

affecting the policy of a statute "we ought not to disregard those means to which the realization of that policy was confided."

In further support of his contention that the rejection of the amendment relating to home work did not have the effect asserted by the petitioners, Judge L. Hand stated in his concurring opinion (R. 221) that if home work were excised from the Administrator's powers because of the deletion, he could not even regulate labels. The distinguished judge evidently had in mind the Administrator's argument below, repeated in his memorandum on the petition for certiorari (pp. 11-12), that in a draft of a confidential Sub-Committee Print "A" of February 18, 1938, the provision comparable to 8 (f) read:

> "(3) shall contain such terms and conditions (including the restriction or prohibition of industrial home work or such other acts or practices and such requirements as the keeping of records, labeling, periodic reporting and posting of orders and schedules) as are deemed necessary to carry out the purpose of such order and prevent the circumvention or evasion thereof, or to safeguard the standards therein established."

The obvious answer to that argument is that although all of these provisions were not included in the Fair Labor Standards Act, the record keeping provisions and reporting provisions were included in Section 11 of the Act, but the posting provisions and the provision as to the requirement of labels were specifically deleted from the Act for the very purpose of withdrawing from the Administrator any authority to regulate these practices, as the statement of the legislative history of the Act clearly demonstrates (see supra page 15-16). The Administrator has never attempted to require the labeling of products nor has he promulgated regulations requiring the posting of sched-

ules, and he does not have authority under the Act to make such regulations.

2. Judge Swan, dissenting, said that "terms and conditions" as used in Section 8(f) meant "terms and conditions which are truly incidental to administration, that is, requirements as to keeping records, filing reports, etc." (R. 224). It is not uncommon for statutes to contain tautological provisions; or it may be that Section 8(f) related to the prevention of practices devised by employers to avoid payment of the minimum wage, such as the "split day plan contracts" involved in the *Helmerich & Payne* case decided by this court November 6, 1944. Such evasive practices, unlike the long established practice of home work, could not have been foreseen by the legislators and consequently could not have been specifically dealt with in the Act. Since they involve non-payment of the minimum wage rate, the enforcement provisions of the Act are adequate to permit the Administrator to deal with them.

If the Administrator prescribes as a "term and condition" of a wage order the keeping of special records, or the filing of special reports for home workers, he can enforce these provisions under the Act, for Section 11 (c) makes it mandatory for employers to comply with Administrator's regulations or orders relating to records and reports. Section 15 makes it unlawful to violate the provisions of Section 11 (c) and consequently the criminal penalties of Section 16 and the provisions of Section 17 relating to injunction proceedings are applicable.

The words "terms and conditions" as used in Section 8(f), however, may not be read to include the prohibition of home work, for the Act contains no provision relating to the enforcement of such prohibition. Sections 15, 16 and 17, the enforcement provisions of the Act, relate specifically and in detail to the violations of the minimum wage and

maximum hour provisions, whether they are fixed by statute or by wage order (Sec. 6); they also relate to regulations and orders made by the Administrator relating to learners, apprentices and handicapped workers, record keeping and reports, and to the child labor provisions (Sec. 11c, 12, 14). If the Act had purported to empower the Administrator to incorporate in a wage order under Section 8(f), a provision for the prohibition of home work, Congress would not have spared the few words necessary to include such provision within the scope of the enforcement sections. Assuming the payment of minimum wages to home workers, the goods produced by them may be shipped in commerce with impunity; and, assuming compliance also with record keeping provisions, as the Act now reads, neither employee nor employer would be subject to criminal penalty nor could they be restrained by injunction.

The means of enforcement prescribed by the statute, since they are detailed and specific, cannot be enlarged by implication (cf. *Addison* v. *Holly Hill Products, Inc.*, — U. S. —, June 5, 1944) nor are there any general words in the statute which could be read as a prescription of the method of enforcement of "terms and conditions" relating to home work. The failure of the Act to provide in express language for the enforcement of "terms and conditions" of orders issued under 8(f), as the Act provided for the enforcement of provisions of orders issued under Secs. 11 (c), 12 and 14, clearly indicates that the statute did not include the prohibition of home work as a "term and condition" of a wage order.

3. Other indications that the meaning of "terms and conditions" does not include the prohibition of home work are to be found within the four corners of the Act itself and may be briefly mentioned. The Act deals with child labor in

express terms, indicating that other practices affecting the minimum wage rate were not by implication to be prohibited by the Act.

The phrase "without substantially curtailing employment" recurs in Section 8 (a), (b), (c), (e) and by specific reference, in Section 8 (d), as a limitation on the powers therein conferred. Section 8 (f), however, does not contain this phrase. Certainly, if the words "terms and conditions" were intended to authorize so drastic an act as the prohibition of home work, it would be reasonable to expect that the safeguard "without substantially curtailing employment" would have been repeated.

4. The limited scope of the Administrator's authority under the Act is also indicated by the fact that the statute confines his authority to make rules and regulations to certain specified sections; by the fact that he may only accept or reject the industry committee's recommendations as to the minimum wage rate and may not substitute his own conclusions or vary the committee's recommendation; and by the fact that the administration of the child labor provisions was not delegated to the Administrator.

5. Section 8 (f) has no provision for a hearing with respect to "terms and conditions" of a wage order. (See R. 65). The Labor Department's Uniform State Wage and Hour Law, and S. 2475, which specifically empowered the administrative agency to prohibit home work as a "term and condition" of a wage order, also specifically provided for hearings on the question. Were the words "terms and conditions" intended to include a provision relating to the prohibition of home work it would be reasonable to expect that Congress would have made express provision for hearings on the question of the prohibition of home work.

Conclusion

It is respectfully submitted that the orders and decrees of the United States Circuit Court of Appeals of the Second Circuit should be reversed, and that the Wage Order of the Respondent be modified by setting aside those provisions thereof which prohibit and restrict home work.

Respectfully submitted,

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